UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-scc

- x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC.,

Debtor.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

September 10, 2019

2:31 PM

B E F O R E :

HON SHELLEY C. CHAPMAN

U.S. BANKRUPTCY JUDGE

ECRO: MATTHEW

HEARING re Doc #59903 Motion of the Plan Administrator for Orders Authorizing a Claims Consolidation Auction

HEARING re Doc #59807 Plan Administrators Five Hundred Nineteenth Omnibus Objection to Claims

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Good morning. How is everyone? How are you, Mr. Fail?

MR. FAIL: Good afternoon, Your Honor. Well, thank you. Hope the same for you.

THE COURT: Yep, despite my awkward approach, yes. Okay.

MR. FAIL: For the record, Garrett Fail, Weil, Gotshal & Manges. I want to begin for thanking the Court for taking time and making time on your busy calendar today.

THE COURT: Sure.

MR. FAIL: Looking at the calendar, it's worth nothing that we are days away from the 11th anniversary of the filing of LBHI's case. The two items on today's agenda reflect, in different ways, the passage of time. With me today at counsel's table is my colleague, Jason Hufendick, and in the courtroom with us today are Anton Kolev and William Olshan, with whom you're familiar. Mr. Kolev is LBHI's Treasurer and has been with the estate since 2013 overseeing the distributions.

THE COURT: Okay.

MR. FAIL: Your Honor, for the first item on the agenda, I would propose to turn the podium over to my colleague, Mr. Hufendick.

THE COURT: Sure.

MR. FAIL: As one housekeeping note, he's not admitted yet in the Southern District of New York, but is admitted and in good standing to the State of New York and has an appointment scheduled in the Southern District for his swearing in in October. His admission has been -- his application has been accepted. He just hasn't -- I haven't let him out to get sworn in.

THE COURT: Very good.

MR. FAIL: Thanks very much, Your Honor.

THE COURT: Thank you. Good afternoon.

MR. HUFENDICK: Thank you, Your Honor. For the record, Jason Hufendick, Weil, Gotshal & Manges, for the plan administrator on behalf of Lehman Brothers Holding, Inc. The first item, as Mr. Fail said, on the agenda is the plan administrator's motion for orders authorizing a claim consolidation option.

THE COURT: Yes.

MR. HUFENDICK: We are proceeding with this motion on an uncontested basis.

THE COURT: Okay.

MR. HUFENDICK: Mr. Kolev submitted a Declaration in support of the motion, which was attached as Exhibit A. At this time, I would like to offer into evidence the Declaration filed with the Court to form the basis of the evidentiary record and with factual record for support of

the motion.

THE COURT: Okay.

MR. HUFENDICK: And he's available if the Court has any questions.

THE COURT: I do not. Any objection? All right, very good.

MR. HUFENDICK: Thank you, Your Honor.

THE COURT: I do have a question, though. If you can look at Mr. Kolev's Declaration and turn to Page 2, the chart.

MR. HUFENDICK: Okay.

THE COURT: I could be wrong, but the chart -- well, the chart is -- the purpose of the chart is to demonstrate that the vast number of claims represent the over 93 percent of the distributions, correct?

MR. HUFENDICK: Yes.

THE COURT: Okay. But you see in the left-hand column --

MR. FAIL: Your Honor, no, I think that's the opposite. I think the vast number of claims --

THE COURT: I'm sorry, I misspoke.

MR. FAIL: Thank you, Your Honor.

THE COURT: Right, okay. But in the left-hand column, it says total greater than or equal to 10 million. I think that should be less than or equal to 10 million,

right? In other words, the largest claims at the top are not subject to -- are not eligible claims subject to the consolidation motion, right?

MR. HUFENDICK: That's correct.

THE COURT: Okay. So then the vast number of claims, the 15,000, are claims that are less than or equal to $10 million.

MR. HUFENDICK: That's correct.

THE COURT: Okay.

MR. HUFENDICK: I believe I have my sign backwards.

THE COURT: The sign is backwards, okay. This is just -- I'm doing this merely to demonstrate that I've read your papers.

MR. HUFENDICK: Or at least Mr. Kolev's Declaration.

THE COURT: Okay. So it is -- the sign is in the wrong direction, right?

MR. FAIL: Yes.

THE COURT: Okay, very good. So, in fact, what this is doing is giving the smaller claimants the opportunity to sell their claims with the benefit that the claims are consolidated for the purposes of the estate making subsequent distributions.

MR. HUFENDICK: Yes, exactly.

THE COURT: Okay.

MR. HUFENDICK: And that was essentially one of the primary --

THE COURT: Right.

MR. HUFENDICK: -- goals of this process.

THE COURT: Right. I assume that you looked at what your sister or brother estate, LBI, did in this regard.

MR. HUFENDICK: Exactly. And we modeled the procedures off of their process, and I'm happy to explain some of the differences if Your Honor would like.

THE COURT: I'm good. I'm good. All right. I have no further questions, other just -- other than clarifying my reading of that one particular aspect of the chart. So I did note that there were some folks on the phone, so let me ask if anyone else wishes to be heard with respect to the motion of the plan administrator for orders authorizing a claims consolidation option for the claims pending against the estate.

Okay, very good. If you would submit an order in Word format to chambers, we'll get this entered.

MR. HUFENDICK: We will.

THE COURT: All right?

MR. HUFENDICK: Thank you.

THE COURT: Thank you very much. Okay, so this gets us to Maverick.

MR. FAIL: Good morning, Your Honor.

THE COURT: Afternoon.

MR. FAIL: For the record again, Garrett Fail, Weil, Gotshal & Manges. The next item on the agenda is the plan administrator's brief on remand in further support of its 519th omnibus objection. I'll open it up to questions.

THE COURT: So I think you're hesitating to just launch into an argument.

MR. FAIL: I'm not going to. I just -- I know better.

THE COURT: We've spent so much time on this already. So, you know, your briefs are fascinating because they both -- it's an exercise if you both pointing out everything that the other side, you know, admits and why, therefore, you win. So it was a completely fascinating set of papers.

One thing is clear. We are in a freezeframe as of the petition date; that's what we're figuring out. What is the claim that Maverick was permitted to lodge as of the petition date, right?

MR. FAIL: Yes, Your Honor.

THE COURT: Okay. No dispute about that.

MR. FAIL: Correct.

THE COURT: So for the purposes of claims allowance, it's as if the world ended the day after the

petition date, right?

MR. FAIL: Correct, Your Honor.

THE COURT: We're not going to look at when LBIE filed or what LBI distributed or what the allowed claim was for the purposes of determining what the claim is that they are -- Maverick is permitted to lodge as of the petition date, right?

MR. FAIL: Correct, Your Honor.

THE COURT: Okay. Subsequent history becomes relevant for the application of the one satisfaction rule.

MR. FAIL: We believe so, Your Honor.

THE COURT: Right? Okay, that's great. Then you agree basically on nothing else.

MR. FAIL: We agree --

THE COURT: Well, let me --

MR. FAIL: -- it varies the facts. I don't think there are facts in dispute. The legal issues, we disagree with.

THE COURT: Right.

MR. FAIL: But the facts are undisputed for purposes today.

THE COURT: But the fundamental disagreement or dispute has to do with what it means that the collective documents were reflected in netting arrangement, right? And I think that the kryptonite point is the provision of the

applicable agreement that says that netting or setoff only applies when Maverick is the party that's in default. That's kind of it. If I agree with that, that's dispositive. If I don't agree with that -- in other words, if I agree -- if I focus on what you said in your reply, Mr. Fail, which was basically aha, they admit, they admit, they admit, they admit that the net claim, right, on the petition date was 4.3 million.

MR. FAIL: Right.

THE COURT: If I agree with you -- that was one -- we go in one direction. If I don't agree with you, we go in a different direction.

MR. FAIL: Sure.

THE COURT: Right?

MR. FAIL: I think that's true either way. Either we win or they win, I suppose.

THE COURT: Right.

MR. FAIL: We are arguing that LBHI guaranteed the LBIE's obligations, and that LBIE's obligations under the relevant documents were to return excess collateral. Simply put, there was no obligation to return collateral and then to become a general unsecured creditor or an unsecured creditor of Maverick; that's not how the documents work.

I think the point -- I would respectfully disagree that they're pointing out that LBHI can only net -- or their

argument that LBHI could only net if Maverick defaulted and LBHI didn't. I don't think it's kryptonite because I think we pointed -- as we pointed out in our briefs and we've previously argued, there's another provision in another document that LBHI gets the benefit of; that it's clear from the agreements that these are master netting agreements, that they have the burden of proof to show -- and they have not shown one case or one provision in the agreement that says, LBIE was obligated on the petition date to return all of the assets that were brokered. And that doesn't -- they can't provide that and that's their burden, to get to 118.

THE COURT: But if we are in a freezeframe world on the petition date and LBIE filed the same day?

MR. FAIL: Half an hour to an hour and a half later.

THE COURT: Half an hour later, right? But if we're in a freezeframe world on the petition date, then how is it that I can do the analysis that you want me to do?

MR. FAIL: The way we did it --

THE COURT: In other words, how do I avoid, other than in the context of trying to figure out single satisfaction rule distribution purposes, how do I -- how do I navigate that?

MR. FAIL: So we pointed to provisions. So you look at the claim. The claim is a guaranty claim against HI

saying that LBHI guaranteed LBIE's obligations. You then look to the relevant agreements and what are LBIE's obligations: simply to return excess collateral. The function of a prime broker is -- would only be to return excess. LBIE, as a prime broker, did not undertake to take the risk that it would owe significant amounts and, therefore, HI wouldn't have guaranteed those. It's not commercial reality. The document is replete with references to LBIE holding it as collateral and references to master netting agreements.

THE COURT: But how do I deal with figuring out the extent of the excess collateral --

MR. FAIL: Maverick is -- Maverick is --

THE COURT: -- as of the petition date? That's what I'm struggling with. If we all agree that --

MR. FAIL: We agree on what that is; it's 4.3. There's no dispute that when you look at the -- what they would like to believe as offsetting claims, there was $118 roughly million dollars of collateral, there was $114 million of short positions, 4.3 is undisputed.

The only question is, were they ever entitled to 118, such that when they got to set off their corresponding claims, that's relevant. They want to look subsequent for an application, and we're saying there was never an obligation to give back 118; that's a fiction, that's false,

that's not commercial reality. You can't separate, in this instance, the collateral from the obligation.

This isn't like a mortgage, you know, a house, you know, a mortgage. This was a series of transactions, some in the red/some in the green. But as the prime broker, LBIE's obligations was to return excess at any time from time to time. It moved. But there's no debate that on September 15th, it was $4 million roughly, 4.3, owing to LBIE on five funds.

And just the same way for the sixth fund, Your Honor, they didn't file a claim and say LBIE owed me X and I owed LBIE 2X. They just said, you know, net/net, I'm not owed anything. So we think when you look at the obligations that LBIE had, that's what guaranteed. Netting doesn't -- setoff doesn't come in.

There's just -- there's no -- they haven't proven a prima facie case. They haven't pointed you to a provision to affirmatively build up a claim for a gross number. And it's not our job to kind of -- to defeat anything that's not there. There's nothing there; that's our argument. They have the burden of proof to build a prima facie case for 118, and they haven't pointed to a provision that says they're entitled.

THE COURT: But now we get into the difficulty of the procedural posture because, technically, sold this as a

sufficiency hearing and it's kind of an odd duck of a sufficiency hearing.

MR. FAIL: Based on the papers, which was their claim, and based on their pointing to the agreement, and new facts wouldn't come in. Like, there's nothing more relevant, there's no parol evidence that's going to change what the agreements say or the dollar amounts. We're accepting as true for these purposes their valuation of 118 and their valuation of 114. The documents are what they are, and no one is saying that there's anything more for these purposes.

THE COURT: So the bookends -- so what -- is the estate's position that Maverick should have an allowed claim for 4.3 million or have, at most, an allowed claim for 12.3 million?

MR. FAIL: We are conceding, at this point, that they can have a claim for 4.3. There was previously discussions to clarify -- this is a long procedural history.

THE COURT: Right.

MR. FAIL: At different points in the case, prior to this round of briefing on remand, LBHI reserved the right and have argued that across funds --

THE COURT: Right.

MR. FAIL: -- the five or six funds --

THE COURT: Right.

MR. FAIL: -- the collateral was pooled. And the fact that Maverick owed LBIE generally even more than the 4.3 would wipe it out to zero; and, therefore, LBIE's obligations were zero.

THE COURT: Right, right.

MR. FAIL: There was a discussion before we came back for this round of briefing, like maybe that was a fact that we needed to do discovery on. LBHI said and then made a decision, it isn't worth the discovery, it isn't worth the delay for a claim of $4.3 million. Each claim stands alone, there's no facts in dispute, there's no need for discovery.

THE COURT: Okay. And then the bookend is -- and I can speak to Maverick's counsel about this -- but the bookend is that Maverick seeks to collect 16.2 million.

MR. FAIL: Right, Your Honor.

THE COURT: Right? Seeks to lodge a claim for 118 million and then present that claim until it gets enough distributions to fill up 16.2 million. So those are -- so those are the buckets, right? So we're at an allowed claim of 4.3 at whatever the -- I mean, going rate is, like, 40-cent distributions.

MR. FAIL: Say, like, 20 cents per use, 29 cents.

THE COURT: 29 cents.

MR. FAIL: 30 cents.

THE COURT: Okay. So those are the goalposts --

MR. FAIL: Correct, Your Honor.

THE COURT: -- that we're at. And if you could show me what provisions of the applicable agreements override the argument; that, you know, we can talk about setoff all we want, but, in fact, there was no setoff. Show me which provisions of which agreements of fact within E, the automatic netting that overcomes the limitation that only applies when Maverick is in default. Show me that, if you can, please.

MR. FAIL: Give me just a moment, Your Honor.

THE COURT: Mm hmm. I'll help you a little bit.

MR. FAIL: I was going to -- I'm just asking for an extra copy to present.

THE COURT: Okay.

MR. FAIL: But if you have it, Your Honor.

THE COURT: No, I don't. I'm just keying off of Page 10 of Maverick's brief, which recites, and I think in the GMSLA, that the parties expressly agreed that an LBIE bankruptcy would not result in an automatic setoff of all mutual debts.

MR. FAIL: Your Honor, the Paragraph 4 isn't required, so that's coming -- they're quoting Paragraph 4 of the prime brokerage agreement, right, Your Honor?

THE COURT: I can't tell. The reference is to Section 9 of V of an addendum to the GMSLA. And then that -

- the citation before that is to Paragraph 4 of the prime brokerage agreement.

MR. FAIL: So Paragraph 32 of the prime brokerage agreement is --

THE COURT: Hold on. Let me try to -- I have your binder here. Let me see if I can find it. It's Exhibit 7. So I'm in the prime brokerage agreement.

MR. FAIL: And we'll go to Paragraph 32.

THE COURT: We're in the master prime brokerage agreement.

MR. FAIL: That's it, Your Honor. Customer prime brokerage agreement.

THE COURT: Paragraph 32? It's the wrong one.

MR. FAIL: Yeah.

THE COURT: Tab 4. Tab 4?

MR. FAIL: Your Honor, there's a customer prime brokerage agreement.

THE COURT: Yeah, I got it.

MR. FAIL: So Paragraph 32 says, cumulative rights entire agreement. And skip down past the first sentence, quote, "To the extent that provisions of any contracts you have --

THE COURT: Hold on, Mr. Fail. I lost you.

MR. FAIL: Okay. Page 9.

THE COURT: Okay, I got it. So Paragraph 32?

MR. FAIL: Mm hmm, that's right, Your Honor. To the extent that any -- and we reference it in Paragraph 11 of our reply brief. To the extent that the rights, remedy -- to the extent that any provisions of any contracts you have with any Lehman Brothers entity, whether heretofore or hereafter entered into or inconsistent, whether inconsistency between the contracts or within a single contract, conflict shall be resolved in favor of the provision which afford Lehman Brothers with the maximum rights, remedies, benefits, or protections.

And so, we argue that consistent with the commercial context of a prime broker getting collateral and not taking -- not being exposed to the credit risk for the short provisions of $104 million in this instance, for example, of its counterparty, there is no -- there is no rhyme or reason that -- and they literally point to no provision in the agreement which affirmatively says that LBIE had to return, upon a LBIE default, all of the assets, all of its collateral and stay naked for the shorts position.

It just doesn't make sense and it's because it doesn't -- it doesn't exist. There's no provision here that says return the collateral. All of the provisions talk about returning excess and talk about LBIE, the prime broker, protecting itself for the counterparty default. Of

course, this was a world where no one predicted a Lehman Brothers default and the prime brokerage agreement this Court is familiar with, you know, and all the other -- many of the other agreements regarding Lehman-friendly, as opposed to individual customer-friendly. There's simply no provision. And so this cumulative rights provision, though, does take us to the other document, which gives netting upon either parties' default.

THE COURT: And where is that?

MR. FAIL: So --

THE COURT: So what they go -- what Maverick goes on to say is that you admitted that you had gotten that wrong, right? So Paragraph 22 of their brief, they say, although it has now changed its tune, LBHI previously admitted to this Court that Maverick's reading of the contract is correct. Quote, "Now we made a mistake in our opening brief presented to Your Honor the netting provision in the prime brokerage agreement, which provides for netting, and Maverick correctly pointed out in their opposition that that only applied if Maverick was in default."

MR. FAIL: With respect to that one section that we cited for that agreement, the record speaks for itself. We did say that that only applied in Maverick default situation, which wasn't the current situation. At that

hearing, the transcript reflects that we, at the same time we did that in our opening, pointed the parties and the Court to the cumulative rights section and the other agreement. And we said, then we say again that that isn't fatal, it isn't kryptonite, there's no their there.

We would also, you know, harken back -- and I'll try to make it the last time that I say it -- it's not LBHI's burden to prove a negative. They have to -- and that's all Maverick is trying to say, look, this provision doesn't -- doesn't say what they say, but we don't have a burden right now.

They have a burden to show a place in these documents that says, LBIE should have returned all of the collateral, all of its protection and become an unsecured creditor of Maverick for $104 million. And I just -- I don't think they can do that. We said they didn't do that and don't think they can do that, doesn't make any sense.

THE COURT: All right. Thank you, Mr. Fail.

MR. FAIL: Thank you, Your Honor.

MR. MARTIN: Good afternoon, Your Honor. Randy Martin from Shearman & Sterling for the Maverick entities. Solomon Noh is also here from Sherman & Sterling, as is Mr. John McCafferty, who's come from Texas today to be here. We thank you for your time also.

THE COURT: Okay. All right, so --

MR. MARTIN: I feel like maybe I shouldn't launch into an argument either, if it's your preference.

THE COURT: All you have to do is tell me why Mr. Fail is wrong.

MR. MARTIN: I'd start with the kryptonite then, Your Honor.

THE COURT: Okay.

MR. MARTIN: That provision is the only provision --

THE COURT: When you say that provision, which provision do you mean?

MR. MARTIN: I'm talking about the global master securities agreement.

THE COURT: Yeah.

MR. MARTIN: And in particular, the Section 10. This is at Tab 6 of your binder, Your Honor. That is the one and only provision in these contracts, and that is titled setoff. And that goes through a detailed series of mechanics that would allow for --

THE COURT: But let me stop you. So there's, in my mind and experience of these things, there's setoff.

MR. MARTIN: Sure.

THE COURT: Which everyone seems to agree is an act.

MR. MARTIN: Correct.

THE COURT: Okay. But in the ordinary world of these master netting agreements, there is a concept of continuous netting. You're all going to be doing a bunch of transactions and there's all going to be posting of collateral and values are going to move up and down and there's going to be netting.

So I don't use -- I don't see netting and setoff as being the same thing. So, therefore, I find all of the argument that you made about, well, look, nobody setoff and the Supreme Court says that somebody has to actually setoff, I don't find that persuasive or dispositive. Because if, in fact, there's a master netting agreement, then, as Mr. Fail makes a big deal out of, you know, your admission that on the petition date that the net amount was, you know, $4.3 million. So, to me, that's the big -- that's the big thing that I have to figure out.

MR. MARTIN: And I think that's a great distinction, Your Honor. And I think you're drawing a very thought there in an important distinction, because I do think you're probably right that when the Supreme Court said in Citizens Bank of Maryland that there has to be an act of setoff, I don't think they were probably precluding automatic setoff provisions, if those occur in a contract.

So there's two types of provisions, I think, and I think you articulated them well. On the one hand, there are

these automatic netting provision, and on the other hand, there are these discretionary setoff provisions. Everything the pointed to, Your Honor, they pointed to about a dozen provisions, those are discretionary setoff provisions, and those do require under Supreme Court precedent an affirmative act. Our allegation is that act was not taken here.

You are right, of course, Your Honor, that there is a distinction between an automatic and self-effectuating type provision, but there is one and only one such provisions in these contracts, Your Honor. It's in Section 10 of the global master securities lending agreement, and it sounds like you've looked at it, so I was going to go through in some detail, but I won't. It's about two pages long. I think it's a customary provision. You've seen provisions like this in the Pyxis CDO case, for instance.

But, Your Honor, I wish I had called it the kryptonite. When you turn to Page 27 of the addendum, it could not be more clear. Section 9 on Page 27 of the global master securities lending agreement says Paragraph 10; that is the only setoff, automatic setoff provision in the contract will only apply if Party B is the defaulting party. Maverick is Party B. Maverick did not default.

The one and only provision that would save them that would allow for this automatic setoff. that is exempted

under Supreme Court's requirement they actually take affirmative action, was expressly agreed by the parties not to apply. In other words, Your Honor, the parties sat down, looked at a master netting provision, looked at a provision that would do exactly what they want you to say happened here, and said no, we won't have this automatic setoff. It couldn't have been more clear.

It's not just, Your Honor, that it's missing from the contract; it's that in the contract. The parties looked at it, and then said Paragraph 10 of this agreement will only apply if Maverick defaults. We didn't default, Your Honor.

They make an argument, Mr. Fail -- I don't want to go on if you're looking at the language, Your Honor.

THE COURT: No, just give me a second. So what you're saying is that, just as an economic model, what Mr. Fail posits as being a commercially unreasonable set of circumstances, was, in fact, the case. That if on the LBHI and LBIE filed, because Maverick hadn't terminated yet, right, and Maverick was not in default, at that moment, Maverick had the right to demand all of their collateral back without regard to the fact that that would turn into an unsecured position. Because that's just a weird thing, right?

MR. MARTIN: You're right. You're right, Your

Honor.

THE COURT: Okay.

MR. MARTIN: This is a bit of a misdirection play. It's a clever -- it's a clever argument, but it misconstrues what really would have happened.

THE COURT: Okay. So tell me what would have really happened.

MR. MARTIN: We should have gotten $4.3 million of cash, yes, for our $118 million. That leaves the question, Your Honor, what happens to the other $114 million? They obviously had to give us that money as well. And the way they had to give it to us, Your Honor, was through the reduction of the debt that we owed them. We obviously would have accepted that. We weren't going to say send us a wire for $118 million and we're going to send you a wire back for 144.

THE COURT: Right.

MR. MARTIN: That's what the Supreme Court says is absurd --

THE COURT: Right.

MR. MARTIN: -- by the absurd setoff, A owes B, B owes A. What we sure would have accepted, Your Honor, if it had happened -- and it didn't happen -- was a reduction of the short positions, the loans that were outstanding.

THE COURT: Right.

MR. MARTIN: Four years after LBIE goes bankrupt, they pop their head out of the surface and say, guess what? All of your short loans are still outstanding. So critically, Your Honor, we were not only owed $4.3 million; we were also owed the closing of our short positions. If they had done that -- and that, by the way, wouldn't have been the commercially thing, as you've intuited from the very beginning, Your Honor. This is what Mr. McCafferty went to London in 2012 to argue about.

The commercially reasonable thing would have been for them to have agreed, because they breached the contract, that all of the positions could have been closed out.

THE COURT: But if you agree that at that moment all that Maverick was entitled to was excess collateral, right?

MR. MARTIN: We don't agree.

THE COURT: Well, you just said the 4.3. And because then, what that -- so that's a moment in time where there was 4.3 of excess collateral. What you're then saying is that, but afterwards, LBIE messed up and that caused us additional damages. No?

MR. MARTIN: Let me be more clear than Your Honor just did.

THE COURT: Okay.

MR. MARTIN: This is an absolutely critical point.

THE COURT: Okay.

MR. MARTIN: We had $118 million of our property with LBIE.

THE COURT: Yes.

MR. MARTIN: We owned it. We pledged it as security, but we owned it.

THE COURT: Right.

MR. MARTIN: It was our property. They say we don't understand how collateral works. This is kind of crazy that I'm going to tell a Bankruptcy Judge how collateral works.

THE COURT: No, that's fine.

MR. MARTIN: But here's how collateral works. They don't get to come in and seize our collateral because they defaulted. Moreover, when they do seize your collateral, they don't just get to keep it. Yes, we had a net balance of 4.3 million that they owed us in cash. But if they had taken the $114 million of other Maverick property, they didn't get to put it in their pocket. They had to use the proceeds to pay down the debt. That's real value, Your Honor. It's value we didn't get.

And it is critically important what happened in 2012. You have to look at the petition date only to value our claim. But in 2012, they popped their head up and say, by the way, we never reduced any of that debt.

THE COURT: That they being LBIE, not LBHI. LBHI is hanging out over here waiting --

MR. MARTIN: You're right.

THE COURT: -- to see what happens, right?

MR. MARTIN: Correct.

THE COURT: Okay.

MR. MARTIN: Okay. That's real value, Your Honor. The $114 million of application of collateral to repay debt, that's the 114 million we didn't get.

THE COURT: But what Mr. -- what LBHI continues to say is, I hear you, but too bad, so sad, to use technical legal argument because the only thing that LBHI guaranteed was LBIE's obligation, and LBIE's obligation was only to return excess collateral. And you just told me that on the petition date, which is the date that we all agree the as-of date when I have to value it, that as of the petition date, the obligation was to return the excess collateral; that there's no an independent obligation to return the 118 of collateral.

MR. MARTIN: There was not an obligation to send us a wire in cash and to become an unsecured creditor. But there was absolutely, Your Honor, an obligation if they are going to seize $114 million of our property to immediately use it to cancel indebtedness.

THE COURT: So there's -- so what you're saying --

MR. MARTIN: That's what they didn't do.

THE COURT: -- that was a breach.

MR. MARTIN: Of course, it was a breach. The only other thing you could believe, Your Honor, is their position, which is that they could just keep the $114 million and not use it and not apply it to pay down the debt. That's obviously not what the contract provides.

I have it in my outline about nine times; I'm not going to say it nine times. That's a breach, Your Honor. If you seize on someone's collateral, take it, keep it, and don't use it to pay the indebtedness and then sue them on the indebtedness? Of course, that's a breach.

THE COURT: So let me ask you -- let me switch before I ask Mr. Fail to come back. So procedurally, there still is sufficiency hearing.

MR. MARTIN: On the 11th anniversary.

THE COURT: Happy anniversary to me. So what you would have me do is -- so sufficiency hearing means there's a hearing on the plan administrator's objection to the claims. You would have me deny that.

MR. MARTIN: Yes, Your Honor.

THE COURT: Okay. And then what?

MR. MARTIN: I would hope that they would spare you, at this point, an evidentiary hearing because the facts are not in dispute. You just heard Mr. Fail say that.

THE COURT: But then what do I -- what would I have before -- so then I have filed claims that haven't been stricken, right?

MR. MARTIN: What I would hope they would do, Your Honor, and we could discuss --

THE COURT: And the claims, you know, so I looked at this. There are -- and we -- and you've all agreed also that it's kind of one aggregate number, even though there's multiple claims.

MR. MARTIN: I'm using that for a convenience.

THE COURT: Yeah, yeah, yeah.

MR. MARTIN: It's very important that these are separate legal funds.

THE COURT: I absolutely agree. Yeah, absolutely agree, just for the purpose of claim disposition. I'm just trying to figure out if I agree with you, what do I -- what are we going to do next?

MR. MARTIN: We can do one of two things. If years after having received very comprehensive discovery from us, they have an argument on the facts, which he just said were I think uncontested, and they are going to be uncontested. This happened, they've told us before, they have no contrary evidence or independent evidence.

But we can do one of two things. They'll either tell you they want an evidentiary hearing, at which point,

we'll come in and we'll show you emails that show definitely that there was no setoff fund in 2008. Then we'll show you basically that we received $102 million, rather than $118 million. We'll go through this. It'll probably be a half day or a day at most; that'll be up to them. Or they can stipulate that the facts that we've asserted are true. They have those facts before them in documents we produced many years ago.

At that juncture, Your Honor, I think they would still have their right to appeal to the Second Circuit, should they choose to do so. And the Second Circuit will decide, you know, whether they agree with your interpretation of Section 562 or Judge Abrams and Judge Peck's interpretation of Section 562, and they could strike our claim down to zero. I think that's what they should do.

But we have to do one of those two things, I think, Your Honor, move on to an evidentiary hearing, if they insist on one and they want to torture you, or we can move on to the appeal before the Second Circuit.

MR. FAIL: For the record again, Garrett Fail. Thank you for your patience.

THE COURT: Sure.

MR. FAIL: A couple of points, maybe the easiest first. What would happen if you decide they're right on the interpretation? I'm not sure what the evidentiary hearing

would be about. If they win, they win and then we'd have our appeal rights. Mr. Martin is correct, we could appeal this or we could take up the District Court's overturning your decision that if you want to look, if as Maverick does today, at a valuation and what happened between September 15th '08 and 2012 when they finally settled and terminated and liquidated their securities contract, the master netting agreement under 562 or otherwise.

If you want to look at all that history, like, we're happy to because, as we said and as you ruled, Maverick owed money on that date, there's no claim, and then we're done. There's no need for evidence here, Your Honor. You're very busy and I don't know what we would fight about.

A couple of other points, though. I mean, maybe I didn't connect it well enough. But I really don't -- we really don't think that there's kryptonite in the paragraph that Mr. Martin cites to, because what he's saying happened is that --

THE COURT: But he's saying --

MR. FAIL: If you look at --

THE COURT: So you have the standard -- you have the standard GMSLA, right?

MR. FAIL: Yeah, but then you go to the exhibits.

THE COURT: Right.

MR. FAIL: But let's read the exhibit; let's not

just -- well then let me read it. And it says, "The collateralization and margin requirements and procedures relating to this will be governed by the margin lending agreement." Okay? So let's look at that. That's at Tab 5 in Your Honor's binder. And on Page 3 of that margin lending agreement in subsection (d), it also talks about only excess. It says, quote, "Upon satisfaction by borrower of all obligations (and all other obligations owed by borrower to each affiliate of lender), lender shall return to borrower the collateral." So, again, upon satisfaction, lender shall return.

So there's nothing -- there's no they're there yet, right? If you want to look at the margin lending agreement, you look at the margin lending agreement, and it has the same excess type language. You don't give it all back. You give it all that's net; you only get back net. That's the one thing.

And then Tab 7 is the, to close the loop on what happens when you look back at the old most favored nations document.

THE COURT: Back in the prime brokerage agreement.

MR. FAIL: Back at the old -- right, and that's the old master prime brokerage agreement. That provision in Section 13 makes it clear that it's only the net. So, again, they tried to debunk and tried to say that it doesn't

apply, and obviously what's been -- you know, what was articulated prior in previous oral argument. I mean, the document is here; you can look at it. It's before you. It's not controversial; it's not controverted. This doesn't say scrap it and return gross. Otherwise, you would have read it in the papers. We would have read it in the papers, and we would have said, wow, you pointed to something.

Instead, we're saying you haven't pointed to anything, and what you did point to isn't that. It's the same language, only the net. So I think that's very important.

We also think that their reference to what happened between 2008 and 2012, you know, and the valuation dropping and changing is irrelevant. If we wanted to look at what happened, you know, we were happy to. We did, Your Honor did, and we looked at what happened on 2012 when they did it.

Everything else, you know, is, at best, collateral damages, which is barred by the prime brokerage agreement. I think Your Honor found that in other cases before the Court on prime brokerage agreements. You know, at best, if there was a swing, there was -- that's collateral damage and what happened.

Your Honor has also ruled, and now the District Court has instructed you to look, at valuing the claim on

the petition date only. We weren't asked to wait. We can't be asked to wait as a guarantor in bankruptcy until all of the obligations of all of the many primary obligors were settled and satisfied. That's not what we did, it's not what you're supposed to do, it's not what the law dictates.

So when you look on the petition date, we don't have to guess, you know, what would happen later. We didn't have to be right when you look at what should have happened on the petition date. It may be wrong, but that's what the claim that you get on the petition date.

THE COURT: Well, hypothetically -- and we've had this in another matter that I won't charge Mr. Martin with knowledge of that -- where if you posit that instead of still being here after 11 years doing this, that in three years, somehow the LBHI estate will wind down before LBIE had a chance to do anything. Right?

MR. FAIL: Within the first day, within the first week --

THE COURT: Right.

MR. FAIL: -- we could have. They demanded money from LBHI. What was LBHI to do on that day? LBHI was to give $4.3 million. You know, we've said it, they've admitted it. Turn to that purpose, they were owed a net of 4.3.

THE COURT: So, Mr. Martin, if the world had ended

before LBIE, as you said, lifted its head up, I mean, that would have been it. I mean, I'm getting up, I'm turning out the lights, you know, what are you entitled to. You couldn't have said please wait, right? You would have just had to take the $4.3 million. No?

MR. MARTIN: No, Your Honor.

THE COURT: Why not?

MR. MARTIN: Because this is a guaranty of payment, not a guaranty of collection.

THE COURT: So your idea is that everybody who shows up with a guaranty of payment, I would have to keep this estate open until all this other stuff happens?

MR. MARTIN: Let me explain just very briefly what the distinction between a guaranty of payment and a guaranty of collection.

THE COURT: Okay. You can do that, but in a non-condescending way.

MR. MARTIN: I'm sorry. I didn't mean to be condescending at all. I'm trying to articulate what the law is. The distinction is, if you have a guaranty of payment, Your Honor, you can go to the guarantor without taking any enforcement action against -- you're aware of the concept.

THE COURT: I am aware of the concept, yes.

MR. MARTIN: So, yes, our position, Your Honor, is that we could have taken $118 million from LBHI. Now, they

say that's commercially unreasonable; in fact, it's not. There are many protections that would have been available to LBHI. Most importantly, Your Honor, they should have had, and should have negotiated if they did not, rights of subrogation. Those are there to protect the issuer of a guaranty of payment in a circumstance precisely like this, where the guarantor is asked to make good on the liability in the first instance. So, yes, we would have had a claim for $118 million. They could have done various things. This is all very hypothetical.

THE COURT: Yes.

MR. MARTIN: We should probably go with what actually happened, we would argue. One of the things they could have asked LBIE to do is to say, look, why don't you please agree that the $114 million of debt that you are claiming Maverick owes you is extinguished, and we'll give them 4.3. That would have been the more rationale way to resolve it.

THE COURT: For LBHI, on the one hand, and LBIE, on the other hand to have had that conversation?

MR. MARTIN: Yes, exactly. But, yet, if something got caught in the weeds, Your Honor, and they couldn't cause LBIE to perform their obligations, they had issued a guaranty of payment.

THE COURT: Well, I'm quite sure at that point in

time, they didn't have ability to direct LBIE to do anything.

MR. MARTIN: I think probably right.

THE COURT: That's just one of the many lessons of Lehman was that LBIE did its own thing, right?

MR. MARTIN: Understood, Your Honor.

THE COURT: Okay.

MR. MARTIN: And, yes, if you take on that risk by issuing an absolute and unconditional guaranty of payments and you say you're guaranteeing all obligations, I do think they would had to have given us $118 million. I think they would have had a claim back against LBIE for the full amount and they would have been protected in that manner, but they took on that risk. That's what we believe a guaranty of payment gets you.

THE COURT: Okay, all right. Thank you very much. Let me give Mr. Fail last looks, all right?

MR. MARTIN: Thank you very much.

THE COURT: Thank you very much.

MR. FAIL: Thank you, Your Honor.

THE COURT: This is as good as Nadal Medvedev, I think.

MR. FAIL: Let's see how it works and who's who, but I'm glad others are having fun watching and I hope they are. You know, I haven't heard an argument that overcomes

the provisions that I pointed to, both in the margin lending agreement itself with the Section D that I read and in Tab 7 of your agreement, the 99 master prime brokerage agreement, in Section 13, which deals with closeout, which, you know, I could read into the record or Your Honor has in her Tab 7, which says, "On the occurrence of an event of default, the following shall immediately occur."

Now I note Mr. Martin talked about if this was an immediate, then, you know, LBHI wins. So here it is, "It shall immediately occur." It's automatic. Any obligation of the prime broker to use reasonable endeavors, dah, dah, dah. All other outstanding obligations of each party to deliver shall fall due for performance. The non-defaulting party shall establish this.

But then D, on the basis of sums established, an account shall be taken as the termination date of what's due from each party to the other under the agreement, and on the basis that each party's claim against the other in respect of their securities, dah, dah, dah, dah, and the sums due shall be set off against the sums due only -- and only the balance of the account shall be payable by the party having a claim valued at the lower amount, and such balance shall be due and payable on the next following business day.

We have the automatic language, we have clear net language, and we have the trail of dots and breadcrumbs

leading you to it. If there's any ambiguity, which we don't believe there is, we believe it has to be resolved in favor of LBHI's argument. There is nothing to support that the burden of proof that Maverick has to support its claim in the documents or otherwise. And we really honestly have -- we only have an obligation to look at the proofs of claim. That was their opportunity to present their prima facie case; there's no trial needed.

Thank you, Your Honor.

THE COURT: All right, thank you. All right. Not going to give you your decision today. Too much to think about, so give me some time. I'll reach back out to you and let you know what I intend to do next and what makes the most sense in terms of giving a decision, having you come back in to plan next steps or the like. But I find this fascinating, with a high degree of difficulty. And happy 11th anniversary.

MR. FAIL: We saved the best for last, Your Honor. Thank you very much for your time.

THE COURT: Okay.

MR. FAIL: Happy anniversary, Your Honor.

THE COURT: Yeah, thank you. Thank you. Have a good afternoon.

MR. FAIL: Thank you.

MR. MARTIN: Thank you.

(Whereupon these proceedings were concluded at 3:20 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Landanski Hyde

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